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No. 95-1726

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE LABONTE, ALFRED LAWRENCE HUNNEWELL, AND STEPHEN DYER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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20 pp

TABLE OF AUTHORITIES

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Respondents offer two principal defenses of the Sentencing Commission's determination in Amendment 506 that the maximum term of imprisonment to be used in sentencing under the Career Offender Guideline means the maximum term without including increases in that term based on the defendant's prior criminal record. First, respondents argue (Resp. Br. 20-35) that if the Commission's approach can be explained as a reasonable implementation of the Sentencing Reform Act as a whole, "that guideline is not subject to judicial invalidation" (Resp. Br. 2), even, apparently, if it squarely conflicts with spe-

cific and unambiguous language in 28 U.S.C. 994(h). Second, respondents argue (Resp. Br. 37-47) that if it is proper for courts to inquire whether the Commission has violated a specific statutory requirement, Section 994(h) is "not free from ambiguity" on the issue of whether the unenhanced statutory maximum term of imprisonment is the "maximum term authorized." Neither contention has merit. The first contention would accord the Sentencing Commission untrammeled freedom to disregard clear congressional mandates without any meaningful judicial check. The second contention finds no support in the language of Section 994(h), which clearly requires the Commission to specify sentences "at or near the maximum term authorized," *i.e.*, the enhanced maximum term for repeat offenders.[1]

1. In our opening brief we argued that, with respect to defendants who are subject to an enhanced statutory maximum term of imprisonment based on their prior convictions, the phrase "maximum term authorized" in Section 994(h) clearly and unambiguously refers to the enhanced maximum. Respondents' central submission is that the Court need not answer that question, because Congress expected the Commission to implement Section 994(h) "not in isolation but rather in the full context of the Sentencing Reform Act's many interrelated goals." Resp. Br. 5; see also *id.* at 15 ("The Act requires the Commission to

[1] Since the filing of our opening brief, two more courts of appeals have determined that the Commission's commentary to the Career Offender Guideline conflicts with the mandate of 28 U.S.C. 994(h) and is invalid. *United States* v. *McQuilkin*, No. 95-2092, 1996 WL 589190 (3d Cir. Oct. 15, 1996); *United States* v. *Branham*, Nos. 95-5213, 95-5241, 95-5357 & 95-5490, 1996 WL 563612 (6th Cir. Oct. 4, 1996).

design a 'career offender' guideline not only in compliance with § 994(h) but also within the context of the guideline system as a whole."). Accordingly, respondents argue, the commentary to the career offender provision at issue here may not be declared invalid if "the Commission's design of that section can be defended as reflecting a fair reading and implementation of *all* of the directives in § 994," Resp. Br. 35, even if the result is a guideline that prevents offenders subject to that Guideline from receiving sentences "at or near the [statutory] maximum terms authorized" for them.

a. Respondents' approach to judicial review of the Commission's action is unsound. The Sentencing Commission does, of course, have wide discretion to formulate sentencing guidelines and to balance competing statutory goals and objectives. *Mistretta* v. *United States*, 488 U.S. 361, 377 (1989). But this Court's cases afford no support for respondents' claim that the courts cannot review any particular Commission guidelines or commentary for compliance with clear and specific statutory directives.[2] Even respondents' amici "do not take the position, proposed by respondents, that the mandates contained in § 994 are, essentially, nonjusticiable." National Association of Criminal Defense Lawyers, et al., Br. 8 n.5.

[2] Respondents state (Resp. Br. 34) that the Court need not hold that a guideline could never be invalidated for violation of a particular provision in Section 994. But the only example of possible judicial review respondents suggest (Resp. Br. 34 n.22) is a violation of Section 994's *procedural* requirements. Respondents leave no room for a court to hold that a Commission guideline squarely conflicts with *substantive* requirements of Section 994.

Respondents rely (Resp. Br. 32) on cases holding that, under the Administrative Procedure Act, judicial review of agency action is not available when the applicable statute "is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985); see also, *e.g.*, *Lincoln* v. *Vigil*, 508 U.S. 182 (1993) (agency's allocation of lump-sum appropriation); *Webster* v. *Doe*, 486 U.S. 592 (1987) (CIA's termination of employee in the interest of national security). Those cases, however, do not hold that a clear, direct, and specific statutory provision is not subject to judicial enforcement because the administering agency generally has discretion in implementing a statutory regime. To the contrary, the presumption in our system is that, while agencies may be entrusted with wide discretion, an agency's violation of an unambiguous statutory command is subject to judicial review. See *McNary* v. *Haitian Refugee Center*, 498 U.S. 479, 496 (1991); *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 671 (1986).[3] In *Stinson* v. *United States*, 508 U.S. 36 (1993), this Court made clear that the Sentencing Commission is no exception; the Court noted that "commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless" it conflicts with the guideline itself or

[3] See *Michigan Academy*, 476 U.S. at 671, quoting S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1946) ("Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.").

"violates the Constitution or a federal statute." *Id.* at 38.[4]

Here, Section 994(h) does not simply give the Commission guidance about general policies it is to further in concert with other statutory aims. Rather, Section 994(h) sets forth a requirement about the sentences that the Guidelines "shall" specify for the identified career offenders. "Congress directed that the guidelines require a term of confinement at or near the statutory maximum for certain crimes of violence and for drug offenses, particularly when committed by recidivists. § 994(h)." *Mistretta*, 488 U.S. at 376. The issue in this case, therefore, does not call for "judicial second-guessing" (Resp. Br. 34) of the Commission's resolution of policy questions. It requires instead a determination of whether the Commission, by prescribing sentences for career offenders at or near statutory maximum terms that do not include recidivist enhancements, has complied with the mandate of Section 994(h) to "specify a sentence

[4] *Stinson* involved amended commentary to Guidelines § 4B1.2 making clear that possession of a firearm by a convicted felon is not to be treated as a "crime of violence" for purposes of the Career Offender Guideline. The Court upheld the amended commentary as a valid exercise of the Commission's authority. 508 U.S. at 47. Contrary to respondents' contention, however, the Court did not "deem[] conclusive the Sentencing Commission's definition" of the term "crime of violence." Resp. Br. 29. Rather, the Court concluded that the amended commentary "does not run afoul of the Constitution or a federal statute." 508 U.S. at 47. That statement was consistent with the government's concession that "the commentary does not conflict with the text of the Guidelines, nor is it contrary to any statute or provision of the Constitution." 91-8685 Gov't Br. at 18-19.

to a term of imprisonment at or near the maximum term authorized."

Respondents characterize Amendment 506 as a legitimate exercise of the Commission's authority "to resolve the internal tensions within the [Sentencing Reform] Act." Resp. Br. 8. But the Commission's latitude to implement the polices of the Act cannot justify the Commission's selection, as a baseline for application of the Career Offender Guideline's "maximum term" requirement, a prison term that is not in fact the "maximum." That is not a policy decision that Congress entrusted the Commission to make. Nor is it relevant to this case that the Commission has significant discretion to determine, with regard to a given statutory maximum, what range of penalties fall "at or near" that maximum. Respondents observe that we have not raised any issue in this case about the boundaries placed on the Commission's interpretation of the "at or near" requirement. See Resp. Br. 19 n.13, 36 n.23. That is because "[t]he issue here is not how close the sentence must be to the statutory maximum, but to which statutory maximum it must be close." *United States* v. *Fountain*, 83 F.3d 946, 952 (8th Cir. 1996), petition for cert. pending, No. 96-6001; *United States* v. *Hernandez*, 79 F.3d 584, 599 (7th Cir. 1996), petitions for cert. pending, Nos. 95-8469 & 95-9335 ("[T]he question presented by Amendment 506 is not how close the offense level and resulting sentencing range must be to the statutory maximum. * * * The debate instead is over which statutory maximum the Commission is to aim for.").[5]

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[5] Nor it is relevant that the Commission has discretion to conclude that drug conspiracy career offenders should be sentenced under the Career Offender Guideline even though Section 994(h) refers only to substantive drug offenses. See Guidelines § 4B1.2 (Application Note 1). As respondents point out (Resp. Br. 17 n.10), two courts of appeals initially held invalid the Commission's inclusion of drug conspiracy offenses within the Career Offender Guideline. See *United States* v. *Bellazerius*, 24 F.3d 698 (5th Cir.), cert. denied, 115 S. Ct. 375 (1994); *United States* v. *Price*, 990 F.2d 1367 (D.C. Cir. 1993). Those courts concluded that the Commission had based its decision on the mistaken belief that drug conspiracy offenses were among the crimes enumerated in Section 994(h). See *Bellazerius*, 24 F.3d at 702; *Price*, 990 F.2d at 1369. Both courts acknowledged, however, that other provisions of the Sentencing Reform Act might well empower the Commission to treat conspiracy offenses, for purposes of the Career Offender Guideline, as equivalent to the underlying crimes. See *Bellazerius*, 24 F.3d at 702 ("Pursuant to its authority under [28 U.S.C.] 994(a)-(f), the Commission could have conducted an analysis that found that certain offenders outside the reach of section 994(h) warranted the same punishment as section 994(h) career offenders."); *Price*, 990 F.2d at 1369 ("the Commission may well be free under § 994(a) to specify equally long terms for defendants not covered by § 994(h)"). The Commission has since amended the commentary to Guidelines § 4B1.1 to make clear that its definition of "career offender" rests upon "its general guideline promulgation authority under 28 U.S.C. § 994(a)-(f)" as well as on Section 994(h). See Guidelines App. C, Amend. 528. The Commission's power to *add* to the coverage of the Career Offender Guideline, however, offers no support for respondents' view that the Commission, on policy grounds, may permissibly depart from Section 994(h)'s requirement of sentences at or near "maximum" terms.

b. Even taken on respondents' own terms, Amendment 506 cannot be defended as a reasonable reconciliation of competing congressional policies. The purpose and effect of Amendment 506 is to produce Guidelines ranges "at or near" an "offense statutory maximum" that is *lower* than the actual "maximum term authorized" by Congress for recidivists such as

respondents. The amendment thus "effectively nullifies the criminal history enhancements carefully enacted in statutes like 21 U.S.C. § 841." Pet. App. 40a (Stahl, J., dissenting). Respondents cannot plausibly assert the existence of a statutory or public policy favoring leniency towards repeat drug offenders. To the contrary, Amendment 506 subverts congressional policy by virtually eliminating the government's ability to invoke the enhanced statutory maximum sentences in *any* case, despite Section 994(h)'s directive that career offenders be sentenced "at or near" those maximum terms.

Respondents place primary emphasis on the Commission's statutory obligation to provide "certainty and fairness in sentencing and reduc[e] unwarranted sentence disparities." 28 U.S.C. 994(f); see Resp. Br. 13-14, 17, 35. Respondents thus invoke the Commission's rationale that Amendment 506 will serve to "avoid[] * * * unwarranted disparity associated with variations in the exercise of prosecutorial discretion in seeking enhanced penalties based on prior convictions." 59 Fed. Reg. 23,609 (1994). As we explain in our opening brief (see Gov't Br. 5 n.1, 21 n.9, 27-28), those disparities cannot be viewed as "unwarranted." The enhanced statutory maximum penalties applicable to recidivist narcotics offenders may be imposed only if "before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon." 21 U.S.C. 851(a)(1). The disparity between the maximum penalties for defendants who do and do not receive the requisite notice is the direct and necessary consequence of that statutory requirement.

"The disparities in the sentences assigned to career offenders cannot be described as mere happenstance, then, but as the foreseeable result of the discretion Congress has assigned to (and left with) prosecutors." *Hernandez*, 79 F.3d at 600.[6] The Commission's view that the two groups should be consolidated to prevent the exercise of prosecutorial discretion is directly contrary to that congressional policy determination. It therefore cannot furnish a legitimate basis for Amendment 506.

2. Respondents contend, in the alternative, that even if courts should review Amendment 506 under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to determine whether it complies with Section 994(h), the amendment is valid because Section 994(h) is ambiguous and the Commission's understanding of Section 994(h) is "permissible." Resp. Br. 38. Respondents' argument fails at the outset, because they do not identify a reasonable basis for construing the phrase "maximum

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[6] We do not have statistical information concerning the percentage of defendants sentenced under the Career Offender Guideline who are subject to enhanced maximum terms because the government has filed a notice under 21 U.S.C. 851. Cf. Resp. Br. 14 n.6. The Department of Justice's policy with respect to the filing of such notices is that generally the prosecutor should seek an enhanced sentence if he can prove the prior convictions. See U.S. Attorney's Manual 9-27.310(B) ("Just as a prosecutor must file a readily provable charge, he or she must file an information under 21 U.S.C. §851 regarding prior convictions that are readily provable and that are known to the prosecutor prior to the beginning of trial or entry of plea."). There are, of course, exceptions to that policy. The relevant paragraphs of that policy are set forth in an appendix to this brief.

term authorized" to refer to the unenhanced maximum term.

"The word 'maximum' naturally connotes the upper limit of a range, or the greatest quantity possible or permissible." *United States* v. *Hernandez*, 79 F.3d at 595. Each of the respondents in this case was subject, as a result of his prior convictions, to an enhanced statutory maximum term of imprisonment. With respect to each respondent, the government filed the notice required by 21 U.S.C. 851(a)(1) as a precondition to imposition of the enhanced penalties. Pet. App. 7a. It is thus beyond dispute that an enhanced term of imprisonment was "authorized" for each respondent. The unenhanced (*i.e.*, lower) maximum term applicable to a non-recidivist convicted of the same offense therefore cannot be the "maximum term authorized" for respondents themselves.[7]

In arguing that the phrase "maximum term authorized" is ambiguous, respondents rely (see Resp. Br. 39-42) on this Court's decision in *United States* v. *R.L.C.*, 503 U.S. 291 (1992). In *R.L.C.*, this Court construed 18 U.S.C. 5037(c), which provides that the term of detention ordered for a juvenile found to be a juvenile delinquent may not extend beyond "the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult." 503 U.S. at 306. The government contended that "the maximum term of imprisonment that would

[7] As we note in our opening brief (see Br. 5-6), the courts of appeals that had addressed the question before the Commission's promulgation of Amendment 506 had uniformly concluded that the "offense statutory maximum" for a defendant with prior convictions was the enhanced maximum penalty, not the maximum penalty authorized for a defendant with no prior convictions.

be authorized" for a similarly situated adult offender was the statutory maximum term. See *id.* at 297. This Court disagreed, holding that the applicable "maximum term" was the upper limit of the Guidelines range applicable to the adult offender. See *id.* at 306-307. In response to the government's contention that the word "authorized" referred to a statutory maximum term because only Congress can authorize imprisonment, the Court observed that "the mandate to apply the Guidelines is itself statutory." *Id.* at 297 (citing 18 U.S.C. 3553(b)). The Court thus viewed the government's construction as, at most, "one possible resolution of statutory ambiguity. *Id.* at 298. A plurality then rejected the government's approach, concluding that the "textual evolution" and "legislative history" eliminated the ambiguity, *id.* at 298-305 (opinion of Souter, J.), while three Justices relied on the rule of lenity, *id.* at 307-311 (opinion of Scalia, J.).

R.L.C. does indicate that in some contexts the phrase "maximum term authorized" may be ambiguous. Respondents are incorrect, however, in asserting that "[t]he decision in *R.L.C.* establishes that the meaning of 'maximum' is not self-evident or unambiguous." Resp. Br. 40. Nothing in *R.L.C.* casts doubt upon the self-evident proposition that, as between two "authorized" terms of imprisonment, the "maximum" is the higher of the two. Rather, the ambiguity in *R.L.C.* involved the word "authorized," not the word "maximum." See 503 U.S. at 298. The question, more precisely, was whether a term of imprisonment above the applicable Guidelines range—*i.e.*, a term that could be imposed only upon a finding of unusual circumstances sufficient to justify a departure under 18 U.S.C. 3553(b)—was a sentence "that would be

authorized if the juvenile had been tried and convicted as an adult."

As we explain in our opening brief (Br. 19 n.7), *R.L.C.* provides no support for respondents' position in the instant case. Because Section 994(h) is designed to constrain the Commission's discretion in the promulgation of Guidelines, the phrase "maximum term authorized" cannot plausibly be construed here to mean the upper limit of the Guidelines range. The Commission itself has recognized that "the phrase 'maximum term authorized' should be construed as the maximum term authorized by statute." Guidelines § 4B1.1 (background). The legislative history is to the same effect. See S. Rep. No. 225, 98th Cong., 1st Sess. 120 (1983) ("proposed 28 U.S.C. 994(h) requires the sentencing guidelines to specify a term of imprisonment at or near the statutory maximum for a third conviction of a felony that involves a crime of violence or drug trafficking"). And, while Respondents at one point assert (Resp. Br. 45 n.28) that "it is not clear that Congress necessarily precluded the Sentencing Commission from interpreting that phrase to refer to the maximum of the applicable guideline range," in an unguarded moment respondents themselves characterize Section 994(h) as "requiring that the guidelines call for sentences for certain 'categories of' repeat offenders that are 'at or near' the 'authorized' statutory maximum." Resp. Br. 3.

At most, *R.L.C.* could be read to indicate that all statutory provisions that bear on establishing the applicable maximum term should be considered in determining what is the "maximum term authorized." For respondents and similarly situated defendants, the result of such an analysis is the enhanced

statutory maximum. Respondents had prior convictions; the government filed the notice under 21 U.S.C. 851 that is a prerequisite to imposing the recidivist enhancements; and no provision of law prohibited the sentencing court from imposing a term of imprisonment up to and including the enhanced statutory maximum. Since respondents are typical of the class that Section 994(h) addressed, the only reasonable construction of Section 994(h) is that it refers to the enhanced maximum terms.

Respondents assert (Resp. Br. 42-43) that *R.L.C.* supports the conclusion that the enhanced maximum terms are not the statutorily "authorized" maximum terms in cases where the government fails to file the notice required under Section 851. That is not obviously correct; *R.L.C.* involved two statutes bearing on the substantive length of the sentence, while this case involves only one such statute, *i.e.*, 21 U.S.C. 841(b). The maximum term "'[a]uthorized' in this context [Section 994(h)] is a prospective term that focuses on possibilities rather than outcomes." *Hernandez*, 79 F.3d at 597. But even if the phrase "maximum term authorized" is ambiguous in cases where no Section 851 notice is filed, it would not justify a conclusion that Section 994(h)'s reference to "maximum" terms may mean the unenhanced maximum in *all* cases. When the government does provide notice of its intent to rely on prior convictions in accordance with Section 851(a)(1), it is clear that a sentence up to and including the enhanced maximum is "authorized" by all of the pertinent statutes. And Congress drafted Section 994(h) with full awareness that federal law authorized enhanced sentences for repeat drug offenders. See Gov't Br. 23-24. Accordingly, there is no basis for concluding that the

unenhanced maximum term could plausibly constitute the Section 994(h) "maximum term authorized" in *every* case involving a career offender.

Respondents also seek to find ambiguity in Section 994(h) by noting that it requires the Commission to prescribe sentences for "categories" of offenders, Resp. Br. 44, that Congress used a variety of phrases in directing the Commission how to formulate the Guidelines, *id.* at 45 (noting use of terms "assure," "insure," and "ensure"), and that Section 994 "reads like the delicate political compromise it was," *ibid.* None of those observations detracts from the fact that Section 994(h)'s reference to "maximum term authorized" unambiguously connotes the uppermost limit—not, as the Commission has provided, a sub-maximum term.

3. Finally, respondents contend (Br. 47-48) that if this Court holds Amendment 506 to be invalid, it should remand for resentencing pursuant to 18 U.S.C. 3553(b). Section 3553(b) provides, *inter alia*, that "[i]n the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence." Respondents' argument is without merit. Invalidation of Amendment 506 would not leave the district court without "an applicable sentencing guideline." Guidelines § 4B1.1 reflects the Sentencing Commission's considered judgment regarding the appropriate methodology for calculating a Guidelines range "at or near" a given statutory maximum. None of the parties to this case has contested the propriety of that methodology, and the invalidation of Amendment 506 would not call it into question. If this Court holds that Amendment 506 is invalid as inconsistent with Section 994(h), sentencing courts may continue to apply Guidelines § 4B1.1 as written, while treating

the enhanced maximum penalty as the "offense statutory maximum" within the meaning of the Guideline.

* * * * *

For the reasons stated above, and in our opening brief, the judgment of the court of appeals should be reversed. The case should be remanded with instructions to affirm the judgments of the district court with respect to respondents Hunnewell and Dyer, and to reverse the judgment of the district court with respect to respondent LaBonte.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

NOVEMBER 1996

APPENDIX

U.S. Attorney's Manual 9-27.310(B) states, in pertinent part:

Current drug laws provide for increased maximum, and in some cases minimum, penalties for many offenses on the basis of a defendant's prior criminal convictions. *See*, *e.g.*, 21 U.S.C. §§ 841 (b) (1)(A), (B), and (C), 848 (a), 960 (b)(1), (2), and (3), and 962. However, a court may not impose such an increased penalty unless the United States Attorney has filed an information with the court, before trial or before entry of a plea of guilty, setting forth the previous convictions to be relied upon. 21 U.S.C. § 851.

Every prosecutor should regard the filing of an information under 21 U.S.C. §851 concerning prior convictions as equivalent to the filing of charges. Just as a prosecutor must file a readily provable charge, he or she must file an information under 21 U.S.C. §851 regarding prior convictions that are readily provable and that are known to the prosecutor prior to the beginning of trial or entry of plea. The only exceptions to this requirement are where: (1) the failure to file or the dismissal of such pleadings would not affect the applicable guideline range from which a sentence may be imposed; or (2) in the context of a negotiated plea, the United States Attorney, the Chief Assistant United States Attorney, the senior supervisory Criminal Assistant United States Attorney, or, within the Department of Justice, a Section Chief or Office Director has approved the negotiated agreement. The reasons for such an agreement must be set forth in writing as required by paragraph 2B, above. Such a reason might include, for example, that

the United States Attorney's office is particularly overburdened, the case would be time-consuming to try, and proceeding to trial would significantly reduce the total number of cases disposed of by the office. The permissible agreements within this context include: (1) not filing an enhancement; (2) filing an enhancement which does not allege all relevant prior convictions, thereby only partially enhancing a defendant's potential sentence; and (3) dismissing a previously filed enhancement.